IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR.

:::

JUDGMENT

Nagarpalika Dungarpur
vs.
Keshav Dass

S.B.CIVIL SECOND APPEAL NO.119/1987 UNDER SECTION 100 CPC AGAINST THE JUDGMENT AND DECREE DATED 25.7.1987/ 31.7.1987 PASSED BY SHRI BAHADUR SINGH CHANDRAWAT, DISTRICT JUDGE, DUNGARPUR IN CIVIL APPEAL NO.1/1985.

DATE OF JUDGMENT ::: 15.5.2006

PRESENT

HON'BLE MR. PRAKASH TATIA, J.

Mr. Bheem Arora, for the appellant.

Mr. Manish Shishodia, for the respondent.

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REPORTABLE

BY THE COURT:

Heard learned counsel for the parties.

This second appeal by the defendant and is directed against the judgment and decree of the first appellate court dated 25/31.7.1987 by which the first appellate court allowed the appeal of the plaintiff landlord and decreed

the suit of the plaintiff for eviction of the appellant tenant.

The facts of the case are that one Mahant Raghunandan Das gave big property to appellant Municipal Board on rent on 1.1.1956 for which a deed was executed between the said Mahant and the Municipal Board, Doongarpur on 14.3.1957. The property is 700 feet x 225 feet and was enclosed by boundary wall. The dispute is whether the property in question given by said Mahant Raghunandan Das to the appellant Municipal Board is given on perpetual lease or a lease for particular purpose with right to evict the tenant only on happening of events mentioned in the lease deed/patta. The deed dated 14.3.1957 has both the words patta as well as rent deed but it starts with following language :-

"यह पट्टा जो आज तारीख 14/3/57 को महंत श्री रघुनन्दन दास गुरू बलराम दास जी व्यवसाय मंदिर पूजा निवासी डूंगरपुर (जो आगे पट्टादाता कहा जायगा) प्रथम पक्ष और श्री म्युनिसिपल बोर्ड डूंगरपुर (जो आगे पट्टादार कहा जायगा) द्वितीय पक्ष में परस्पर लिखा गया ।

जो कि पट्टादाता महंत री रघुनन्दन दास की नाना भाई पार्क तथा कमल तलाई की समस्त भूमि जो क्रमश: 700 फीट तथा 225 फीट (सात सो फीट तथा दो सो पच्चीस फीट) गोल कोट (पक्का) से घिरी हुई है और जिसके पूर्व में तालाब गैपसागर, पश्चिम में सडक सागवाडा जाने वाली, उत्तर में मंदिर रामबोला, दक्षिण में धोबियों की पाल स्थान डूंगरपुर में स्थित है और जिसका पट्टादाता पूर्ण स्वामी एवं अधिकारी है, दिनांक 1/1/1956 (पहली जनवरी

सन् 1956) से पट्टा दार श्री म्यूनिसिपल बोर्ड डूंगरपुर ने उस पर सार्वजनिक बाग लगाने के लिए सर्वदा के लिए किराए पर ली है तथा जिसका कब्जा एवं दखल पहली जनवरी सन् 1956 से ही पट्टादाता ने पट्टादार को दे दिया है, दोनों पक्षें के बीच निम्न लिखित शर्ते निश्चित हुई है जिनकी वे पूर्ण रूप से पालना करते रहेगें:-"

The purpose for giving the property to the Municipal Board is given in the deed as under :-

"1. यह कि पट्टादाता ने पट्टादार को उक्त भूमि का कब्जा एवं दखल देकर अधिकार दिया है कि पट्टादार उस पर अधिकृत रह कर उसमें प्रत्येक प्रकार के वृक्ष लगाये, उनकी देखभाल करे, सिंचाई के लिए नल लगावे अथवा अन्य कोई प्रबंध करे और वृक्ष के तैयार हो जाने पर उनके फल, फुल, पत्ति, लकडी को आवश्यकतानुसार बेचे या काम में लावे कोई हस्तक्षेप पट्टादाता की ओर से पट्टादार के उपयोग में नहीं होगा।"

In the said deed, it is also provided that till the rent is paid by the Municipal Board to said Raghunandan Das, he shall not have any right to evict the Municipal Board from the said property. The conditions no.3 and 4 are as under :-

"3. नियत समय पर किराया अदा करते रहने पर पट्टादार को बेदखल करने का कोई अधिकार पट्टा दाता को नहीं होगा और पट्टादार तथा उसके उत्तराधिकारी बाग एवं वृक्षों के अधिकारी रहेगें। उत्तराधिकारीयों को भी अधिकार होगा कि वे समय समय पर पौधे, लता, वृक्ष आदि लगाते रहें तथा उनके

फल, फुल, पत्ति व लकडी आदि से लाभान्वित होते रहे ।

4. जिस समय उक्त भूमि वृक्षों से हीन हो जावेगी अथवा बाग के योग्य न रहेगी तो पट्टा समाप्त तथा मन्सूख हो जावेगा और पट्टादाता को भूमि का कब्जा प्राप्त करने का अधिकार होगा। पट्टादार अथवा उसके उत्तराधिकारी उक्त भूमि पर काश्त अथवा भवन निर्माण नहीं करा सकेगें और उसको वे बाग के अतिरिक्त अन्य किसी उपयोग में नहीं ला सकेगें।

It is clear from the condition no.3 of the said deed that the lease is heritable. However, by condition no.4, it has been provided that in case, the land will become total treeless or will not be fit for using as garden, the patta will come to an end and the granter shall have the right to take possession of the said property from the Municipal Board. Along with the said condition, it is also mentioned in condition no.4 that the Municipal Board or its successors shall not have any right to construct building over the said land and the Municipal Board and its successors shall not use the land for any other purpose except for the purpose of garden. In condition no.8, it is provided that till the conditions of said deed are followed by Municipal Board, the granter shall not have the right to interfere in the possession of the Municipal Board and in the end, it is further reiterated that the deed is a patta for all times. However, against the words “patta for all times”, in bracket, word “lease deed” is mentioned.

Said Raghunandan Das died in the year 1976 which is

after about 20 years from the handing over property to Municipal Board. Before death of said Raghunandan Das, he alleged to have executed a will in favour of his Chela Keshav Das, present plaintiff on 29.1.1973. Plaintiff Keshav Das filed the present suit for eviction of Municipal Board from the land in question in the year 1980 precisely on 18.2.1980. In para no.5 of the plaint, it is mentioned that the rent since 1973 is due in the defendant but in para no.14 of the plaint, the plaintiff claimed that the rent of 2 years i.e. 1978 and 1979 amounting to Rs.102/- is only due in the defendant and, therefore, the plaintiff claimed decree of Rs.102/-, arrears of rent. The plaintiff also claimed that the defendant materially altered the suit premises by raising three rooms which are constructed for establishing 'octroi office' and the defendant also constructed one room and well in the property let out by the plaintiff's predecessor. Another ground is that by including some portion of the property in dispute, the defendant has allowed some cabin holders to do their business in the said cabins and the defendant started recovering rent from those cabin holders. Therefore, according to the plaintiff, the defendant sublet part of the suit property. It is also submitted that by that, the defendant has violated the terms and conditions of the lease deed and, therefore, the plaintiff is entitled to decree for possession of the suit property along with decree for arrears of rent.

The defendant admitted the facts substantially. It is

admitted that the suit property was taken on rent on 1.1.1956. There is no dispute about its measurement and there is no dispute about execution of the deed dated 14.3.1957. The defendant submitted that it offered the rent for the period from 1973 to 1977 but the plaintiff did not accept that rent. The defendant also submitted that it filed an application in the Court for depositing the rent. The defendant denied the will executed by said Raghunandan Das and also did not accept the plaintiff as successor of said Raghunandan Das for want of succession certificate. It was also submitted that the defendant not only offered rent to Raghunandan Das but after death of Raghunandan Das, rent was offered to the plaintiff also but he did not accept the rent. So far as allegation of raising construction is concerned, the defendant submitted that the property was given by said Raghunandan Das on perpetual lease with right to establish a public park and the defendant after accepting the property for establishing the public park invested lakhs of rupees in developing the garden. To fulfill the said object, the defendant also established a water pump, a chowkidar room, room for technical staff and for keeping the tools for gardening. The property is maintained by the Municipal Board as public garden and, therefore, the defendant has not violated the condition of the deed dated 14.3.1957 nor they have materially altered the premises. The defendant also admitted that they raised footpath near the suit property and constructed some wall only to protect the garden so that the cattle may not enter into the garden. The defendant also submitted that some

persons were given permission to put their cabins but income from the said cabin is used for maintenance of the garden only and that was a necessity.

The trial Court framed issues on 20.7.1981. The relevant issues for the purpose of deciding this appeal are the issues no.3, 4 and 7. Issue no.3 was framed on the basis of the plea taken by the plaintiff about construction of three rooms for octroi office, one more room and one well in the suit premises.

The trial court held that the defendant has not violated any condition of the deed dated 14.3.1957. The plaintiff failed to prove that the cabins were put within the land of the plaintiff. The trial court also held that the plaintiff failed to prove that three rooms were also constructed within the land alleged to have been let out by the plaintiff and in view of the fact that the purpose for which rooms were constructed, the trial court was of the opinion that by those structures, the property has not been materially altered. In addition to the above, the trial court held that the said changes were made in the life time of granter Raghunandan Das and he did not object to it despite the fact that he died in the year 1976 and the plaintiff himself did not raise the objection till 1980. It appears that those constructions did not violate any condition of the contract between the parties, therefore, the plaintiff remained silent for such a long period. The trial court, therefore, dismissed the suit of the plaintiff for eviction of the defendant but granted decree for

arrears of rent amounting to Rs.102/- vide judgment and decree dated 5.12.1984.

The plaintiff preferred regular first appeal and the appellate court held that the defendant itself admitted the construction of rooms in the written statement as well as putting of cabins on the footpath without denying that the said structures are not within the property given by the granter to the Municipal Board, therefore, in view of Order 8 Rule 5(1) CPC, the facts should be treated to be admitted by the defendant. The first appellate court was of the view that the defendant was not permitted to raise any construction specifically and, therefore, the defendant has materially altered the suit premises by raising construction also in additon to the fact that the defendant violated the terms and conditions of the deed dated 14.3.1957. The same was the position about the cabins which were permitted to be put by the defendant. The first appellate court, therefore, decreed the suit of the plaintiff for eviction of the defendant on 31.7.1987.

The second appeal was admitted that on 26.4.1999 after framing following substantial questions of law :-

> "(i) Whether the averments made in the plaint or in the written statement can be used as substantive piece of evidence or these averments are to be proved either by oral or by documentary evidence as envisaged under the Indian Evidence Act ?

(ii) Whether the learned first appellate court has erroneously set aside the findings of fact recorded by the learned trial court on issues no.3 and 4 relating to material alteration and sub-letting without meeting the reasons given by the learned trial court ?"

After hearing both the parties on 24.4.2006, this Court was of the opinion that more substantial questions of law are involved in this case and, therefore, framed following substantial questions of law which are as under :-

"(i) Whether the lease in question is perpetual lease ?

(ii) Whether both the courts below failed to appreciate the nature of tenancy and thereby committed error of law and treated the act of the appellant in violation of the terms of the tenancy ?"

According to learned counsel for the appellant, the two courts below committed serious error of law in appreciating the nature of transaction between the plaintiff and the defendant and further committed serious error of law in construing the deed dated 14.3.1957. It is submitted that intention of the granter deceased Raghunandan Das for giving property to Municipal Board was altogether ignored by the first appellate court. The first appellate court could not appreciate the nature of the property and its purpose for giving it to Municipal Board. The act of the defendant should have been judged with reference to purpose

for giving the property to the Municipal Board.

The deed, though contains the words “lease deed” but it appears that the intention of the granter was very clear and can be found from reading of complete document and mere use of word “rent deed” or “rent” in the deed is irrelevant and superfluous. The intention of the granter is disclosed in the deed when he said that this patta is granted by the granter to the Municipal Board, Dungarpur. The object of grant is establishing a public park. The purpose is very much relevant because of the reason that the property has been let out for the public purpose and not to the person who accepted the grant, clearly suggests that the intention of the granter was to create a perpetual lease so that the property can be used as garden in perpetuity and not for any short period. This intention has been made clear by the granter by specifically mentioning in the condition no.4 of the said deed that till the land becomes treeless or will become not fit for gardening, the granter shall have no right to take possession of the property from the Municipal Board. Thereafter in last para of deed, the granter again specifically and emphatically mentioned that this patta is for all times to come. If the object is looked into along with the restriction accepted by the granter of having no right to evict the defendant from the property in dispute till the garden remains clearly indicate that the intention of the granter was to give the land for ever for public purpose and through the Municipal Board. Not only this but the deed gave right to the successors of the Municipal

Board also to hold property, is clearly mentioned in para no.3 of the said deed, therefore, it is heritable rather say the interest can be devolved upon the successor of the Municipal Board by virtue of the deed itself.

It is also submitted that the granter never objected against any of the activities of the Municipal Board despite the fact that all additions, alterations were made by it during the life time of deceased Raghunandan Das. It is further submitted that in terms of the deed dated 14.3.1957 and to achieve the object of maintaining the garden on the land in dispute, the defendant constructed certain rooms which the defendant never disputed in the written statement but the first appellate court misread the written statement of the defendant. The plaintiff alleged that three rooms for octroi office were constructed whereas in the written statement, the defendant stated that those rooms were constructed for Chowkidar and Technical staff, for keeping the implements necessary for gardening. When the defendant categorically not only rebutted the allegation of construction of octroi office and disclosed the reason for construction of the said rooms, still the first appellate court held that since the specific words have not been used by the defendant that they have not constructed three rooms for octroi office, therefore, it shall be treated to be fact admitted by the defendant. For cabins also, the defendant only stated in the written statement in para no.11 that for protecting the garden, they constructed the boundary wall and also constructed footpath. It is nowhere admitted by the defendant that the

footpath was constructed within the land in dispute or the defendant permitted other persons to put their cabins within the land taken by it from said Raghunandan Das but the first appellate court by misreading the written statement held that the cabins have been put within the land given by the granter.

Learned counsel for the appellant vehemently submitted that all acts which were necessary to fulfill the object for which the land was accepted by the Municipal Board are the acts which cannot be condemned by the successor of the granter in any manner. It is also submitted that looking to the entire area given to the Municipal Board and the construction raised by the defendant, it cannot be said that it has altered the nature and character of the property in any manner so as to destroy the basic character of the property. For this, learned counsel for the appellant relied upon the judgment of the Hon'ble Supreme Court delivered in the case of Secretary, Taliparamba Education Society vs. Moothedath Mallisseri Illath M.N. and others reported in (1997) 4 SCC 484 wherein in almost identical fact situation, the Hon'ble Supreme court held that, “Though shops constructed on some portion of the land but the rent derived therefrom being used for the maintenance and running of the educational institution and therefore, the user not detrimental to the purpose for which lease was granted.” Not only this, the Hon'ble Supreme Court also held that, “Some of the rooms were let out for cultural purposes and marriage purpose, but that also not detrimental to the running and imparting of

education to the students.". It was also held that, "These acts were done to augment the funds of the Society for proper management.". The Hon'ble Supreme Court also held that the High Court erred in law in reversing the finding of two courts below and it was not a case of misuser or contravention of covenant of the lease in a case where the lease was granted for running the educational institutions.

It is also submitted by learned counsel for the appellant that in fact, the issue was framed by the trial court itself that whether the lease is perpetual lease or not and even that issue has been decided against the defendant, still it is pure question of law and gives rise to substantial question of law because of the reason that it is drawing wrong inference from the proved fact and is result of misreading of deed dated 14.3.1957 and reading the document bereft of intention of the granter.

Learned counsel for the respondent vehemently submitted that a big plot of 700 feet x 225 feet was let out to the defendant with clear condition that the said property shall be used only for the purpose of park and not for any other purpose. The part of the land has been converted by the Municipal Board by raising construction of building for which they were not allowed by the granter. It is also submitted that the facts are admitted by the defendant in the written statement where the defendant clearly admitted construction of rooms as well as putting of cabins near the boundary wall and taking rent from those cabin holders. Therefore, the first appellate court recorded the finding

of fact and this Court may not interfere in such finding of fact which is not even erroneous in any manner. Even if the finding of fact is erroneous on facts or in law, even then the High Court should not interfere in such finding of fact and this is settled law that the High Court cannot interfere in the finding of fact recorded by the first appellate court. It is also submitted that it cannot be said that the deed has not been construed properly by the first appellate court. In the deed itself, it is clearly mentioned that under certain circumstances, the granter shall have right to take possession back and which includes on default being committed by the defendant. The deed also contains condition that in case of violation of the condition, the granter shall have right to take possession of the suit property. It is also submitted that the lease cannot be treated to be lease in perpetuity because of the simple reason that the actual rent has been fixed by the written agreement dated 14.3.1957 and there is a clause of taking possession in case of default. There are restrictions upon the Municipal Board with respect to the property in dispute which are also indicate that the lease was never given in perpetuity.

I have considered the submissions of learned counsel for the parties and perused the facts of the case and reasons given by the two courts below, so also, the record of the case.

It will be appropriate to first decide the substantial questions of law framed by this Court on 24.4.2006.

The first substantial question of law is whether the lease in question is perpetual lease. The said question is very much a core question in the present controversy for which the facts in details have been given in the preceding paras of the judgment. The issue was framed by the trial court itself on the basis of the plea taken by the defendant and both the parties led evidence also to prove their cases knowing it well that the deed contains certain averments by which the defendant can certainly say that it was a case of perpetual lease. However, it depends upon the total evidence and more on the intention of the parties which was at the time of giving of property by the granter and accepting property by the Municipal Board. It is clear from the deed dated 14.3.1957 that the property was let out by one Mahant and this property is big one measuring 700 feet x 225 feet. It has not been let out for any purpose for use of Municipal Board except taking product of trees. It has been let out creating right in favour of public in the land in dispute. The property was given in 1956 and it has been used for the said purpose of public park for more than 25 years as the suit has been filed in the year 1980. It was never the case of the plaintiff that deceased Raghunandan Das ever raised any objection about the use of the property in the manner in which the property was used by the defendant. Raghunandan Das died in the year 1976 after about 20 years from the said grant. More than once, it has been used in the deed that the property has been let out for ever (सर्वदा व सर्वकालिक) Not only this, but the granter himself put the restriction upon himself that till

the land shall remain land of public park, he shall have no right to take possession of the suit property. The grant/lease has been given for perpetuity is also indicated by making it heritable/devolution which can take place in accordance with law for the defendant. It appears that the condition, in case of default of two years, the granter shall have right to evict the appellant from the land in dispute is only a term in terrorum so as to put pressure upon the Municipal Board for payment of some consideration in time. At this place, it will be worthwhile to mention here that the consideration is Rs.51/- per annum for such a huge land is also a relevant factor to find out the real intention of the granter. The object appears to be not of earning rent from the property and this appears to be in consonance with the purpose for which the property was given to Municipal Board (for developing and maintaining public park).

In view of the above, it is more a case of dedication of the property by creating a perpetual lease in favour of the defendant with object that it should be used for public purpose and not even for the beneficial use of Municipal Board itself. By accepting this grant, the Municipal Board also incurred some liability of developing a garden over the land in dispute and maintaining it in perpetuity for the benefit of the public. Therefore, it cannot be termed to be a lease of ordinary nature where the lessee will get some benefit out of leased property or shall earn some money by doing some work on the lease property. All those facts have not been considered by the two courts below and

they did not look into intention of granter for entering into such a contract with the Municipal Board. It was the duty of the two courts below to find out the real intention of the parties behind the transaction for finding out the intention in this case, where the deed dated 14.3.1957 is unambiguous and clear and is disclosing the real intention of the granter.

It will be worthwhile to mention here that the plaintiff filed suit for eviction of the tenant without disputing any of the facts mentioned in the deed dated 14.3.1957 which includes the purpose for which it was given to the Municipal Board. The plaintiff even did not explain how, if the condition no.4 remains which says, till tree (garden) remains, the granter shall not have right to take possession of the property from the Municipal Board.

The acts which have been alleged to have been done by the defendant have been explained by the defendant. That those acts have been done only either to protect the garden by raising a boundary wall or by constructing a room for chowkidar, a room for putting some implements etc. So far as the allegation in the plaint about putting some structure within the land or by including some part of the land or park are also vague one and the same is position with the oral evidence produced by the plaintiff. It is true that the witness of the defendant also admitted that there is an octroi office constructed by the defendant in the garden but still that small change or construction cannot be said to have destroyed the basic character of the garden in any manner so as to fall in category of such

material alteration. In broader sense, the facts of present case are similar to facts of the case of Taliparamba Education Society (supra). The defendant can certainly have protection by virtue of condition no.4 of the deed dated 14.3.1957 which allows the granter to take possession of the suit property only in case, the property becomes “total treeless and become total unfit for garden”. The emphasis is on the words “वृक्षों से हीन हो जावेगी अथवा बाग के योग्य न रहेगी तो पट्टा समाप्त तथा मन्सूख हो जावेगा".

Even a minor removal of the garden cannot be a ground for eviction of the defendant from the entire land as it was never the intention of the granter. Therefore, the lease is held to be perpetual in nature and the two courts below failed to appreciate the nature of tenancy while deciding the allegation of changes made by the defendant in the suit property. Firstly, the lease is perpetual one and secondly, the construction made by the defendant even if it is held to be within some part of the garden area, then it has not changed the fundamental and basic character of garden by any stretch of imagination. Hence, both the substantial questions n.1 and 2 are decided in favour of the appellant and the finding of the two courts below on issue no.7 is set aside.

The substantial question no.1 as framed on 26.4.1999 is as under :-

“Whether the averments made in the plaint or in the

written statement can be used as substantive piece of evidence or these averments are to be proved either by oral or by documentary evidence as envisaged under the Indian Evidence Act ?"

The first appellate court decided the issue of material alteration and change of user on the basis of its interpretation of the defendant's pleading in the written statement, therefore, the above question was framed by this Court. So far as the statement in written statement is concerned, that amounts to admission of the defendant. The Court has ample power to grant decree on the basis of admissions made in the written statement. It is not a decree on the basis of substantive piece of evidence but on the basis of the evidence for which the Court has been given power under Order 8 Rule 5(1) CPC. The admission is the best evidence because of the reason that it binds the person who makes the admission. It depends upon facts of each case whether the admission is unambiguous, clear and amounts to admission of fact by the defendant. Here in this case, the first appellate court misread the written statement of the defendant in as much as the first appellate court was under the impression that the defendant has not denied specifically that the rooms were of octroi office or not ? But while doing so, ignored to read that the defendant clearly stated that those rooms were constructed for chowkidar and for putting garden implements which not only amounts to denial of fact alleged by the plaintiff but was necessary for the defendant to plead

because the said facts were in specific knowledge of the defendant and if the defendant would not have explained what for those construction have been made, he might have been held responsible for not disclosing the facts which were in its knowledge amounting to evasive reply and consequently amounting to admission of fact.

In view of the above, it is held that in the present case, the first appellate court committed error of law in holding that the defendant admitted the facts stated by the plaintiff in the plaint and the substantial question no.1 is decided accordingly in favour of the appellant.

The first appellate court also committed error of law in reversing the finding of the trial court on issues no.3 and 4 relating to material alteration and subletting for which reasons have been given in detail in preceding paras and further the first appellate court committed error of law in reversing the finding on those issues without meeting the reasons given by the trial court in its judgment against which the first appeal was preferred by the plaintiff. It appears from the reasons given by the first appellate court that the first appellate court was more influenced by its finding about non-denial of the facts by the defendant and, therefore, did not apply its mind to the reasons given by the trial court on issues no.3 and 4. Therefore, substantial question no.2 framed on 26.4.1999 is also decided in favour of the appellant.

In view of the above discussion, this appeal is

allowed, the judgment and decree of the first appellate court dated 25/31.7.1987 are set aside with no orders as to costs.

This Court expects that the appellant shall keep the garden as garden and shall not use the property for any other purpose by using the land for any commercial activities. How to manage the property is left to the best discretion of the Municipal Board with the hope that they will act in public interest as garden is established at least 50 years ago for public.

(PRAKASH TATIA), J.

S.Phophaliya